UNITED STATES
v.
VIRGIL PROWELL AND
MELINDA PROWELL

IBLA 78-539 Decided February 6, 1981

Appeal from decision of Administrative Law Judge E. Kendall Clarke declaring mining claims null and void. CA 3127.

Affirmed.

1. Mining Claims: Contests--Mining Claims: Hearings-- Rules of Practice: Government Contests--Rules of Practice: Hearings

Where a Government contest complaint, when filed and received by mineral claimants, correctly identifies all claimants as of that time, the substitution or addition of subsequent transferees is the obligation of those who have acquired such an interest and their failure to so move will not vitiate the effectiveness of an adjudication of the validity of a mining claim.

2. Mining Claims: Discovery--Rules of Practice: Appeals: Generally

Where, on appeal, a mining claimant submits arguments similar or identical to those presented before the Administrative Law Judge after the hearing had been concluded and the decision of the Administrative Law Judge correctly summarizes the facts and applies the applicable law, the decision of the Administrative Law Judge will be adopted by the Board.

3. Mining Claims: Discovery: Marketability

A mineral claimant whose claims embrace deposits of both common and uncommon

varieties of minerals cannot aggregate the profits returned from mining the common variety and those netted from mining the uncommon variety to show a qualifying discovery.

4. Administrative Procedure: Generally--Mining Claims: Contests--Rules of Practice: Government Contests

In order to sustain a charge that land embraced within a mining claim is not held in good faith for mining purposes the evidence relating to the mineral claimant's lack of good faith must be clear.

APPEARANCES: William B. Murray, Esq., Portland, Oregon, for appellants; Charles F. Lawrence, Esq., Office of the General Counsel, U.S. Department of Agriculture, for the Government.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Virgil and Melinda Prowell have appealed from the decision of Administrative Law Judge E. Kendall Clarke, dated June 16, 1978, declaring the Lost Horizon Mine, the Lost Horizon No. 1, and the Lost Horizon No. 2 placer mining claims, located in 1974, null and void for failure to prove the existence of a valuable mineral deposit, on the subject land, within the meaning of the mining laws.

This proceeding is based on a contest complaint initiated on January 27, 1976, by the Bureau of Land Management (BLM) on behalf of the Forest Service, U.S. Department of Agriculture, charging:

A. There are not presently disclosed within the boundaries of the mining claims, minerals of a variety subject to the mining laws, sufficient in quantity, quality, and value to constitute a discovery.

B. The land embraced within the claims is nonmineral in character.

C. The land embraced within the claims is not held in good faith for mining purposes.

[1] At the outset, appellants contend in their statement of reasons for appeal that not all of the interested parties were named in the complaint and served with a copy thereof. They point to a quitclaim deed, signed on August 30, 1976, purporting to convey Virgil Prowell's interest in the subject claim to Harry and Phyllis Bienick. The Bienicks were not named in the contest complaint or served with a copy thereof, and accordingly appellants argue that the contest was, for this reason, fatally defective.

[1] Appellants' contention is not well taken. The contest in the instant case was initiated by a complaint issued on January 27, 1976, and received by appellants on February 4 and 6, respectively. Their joint answer was filed on March 3, 1976, in which the only item which appellants specifically admitted was that "they are the owners of the mining claims known as the Lost Horizon Mine Placer Mining Claim, Lost Horizon No. 1 Placer Mining Claim and Lost Horizon No. 2 Placer Mining Claim in Del Norte County, California."

Subsequently, on August 30, 1976, appellant Virgil Prowell signed a quitclaim deed to the Bienicks which was subscribed before a notary public on September 20, 1976. This transfer, therefore, occurred over 6 months after the initiation of the contest. Appellants argue that the Bienicks were, in effect, a necessary party to the contest and the failure to join them necessitates dismissal under 43 CFR 4.450-5(a), citing Johnson v. Udall, 292 F.2d 738 (D. Cal. 1968).

The case cited by appellants, Johnson v. Udall, supra, stands for the proposition that a contest complaint must name every real party in interest in order to be efficacious. The critical date, however, is not the date of the hearing but the date of the issuance of the complaint. Thus, the Court in Johnson v. Udall took particular pains to note "[i]t is clear that the contest complaint when filed did not comply with the requirements of [the regulations]." Johnson v. Udall, supra at 749 (emphasis supplied).

When the Bienicks acquired Virgil Prowell's interest in these three claims, such interest was already subject to the contest proceedings process. It is clear that, had the Bienicks sought to intervene in the hearing, party status would have been accorded to them. It was their obligation, however, to seek substitution. We hold that where the contest complaint, when filed and received by the mineral claimants, correctly identifies all claimants as of that time, the substitution or addition of subsequent transferees is the obligation of those who have acquired such an interest and their failure to so move will not vitiate the effectiveness of an adjudication of the validity of a mining claim.

In point of fact, the Bienicks had actual knowledge of the proceedings and, indeed, Phyllis Bienick testified at the hearing. There is no basis for a finding, herein, that the contest process was procedurally defective. 1/

1/ Moreover, the present regulations of the Department expressly provide that a Government contest complaint is not subject to dismissal for failure to name all parties interested. See 43 CFR 4.451-2(b). Thus, even had the transfer to the Bienicks preceded the initiation of the contest complaint, it would not have been subject to a motion to dismiss on the grounds of failure to serve all interested parties.

[2] With regard to the question of the existence of a discovery within the limits of the three claims, we have reviewed the record in this case and the arguments raised by appellants in their statement of reasons and we note that they are virtually identical to those pressed by appellants before Judge Clarke. Judge Clarke's decision sets out in detail a summary of the testimony and the evidence and applicable law as well as his findings and conclusions. We are in agreement with his decision and therefore adopt it as the decision of this Board. A copy of it is attached hereto.

[3] Appellants contend that the high quality sand and gravel found on the claims is marketable and that gravel tailings yielded as a result of gold placer operations are saleable notwithstanding that such deposits of common variety mineral materials could not be located after July 23, 1955. 30 U.S.C. § 611 (1976). Appellants aver that the value of the sand, gravel, and magnetite crystals, when added to the value of the gold, represents a combined deposit which is susceptible to commercial exploitation. However, it has long been the rule that the value of a nonlocatable mineral deposit may not be added to the value of a locatable mineral deposit for the purpose of establishing that a qualifying discovery has been made. The validity of a mining claim located after July 23, 1955, depends upon whether a discovery has been made only with respect to the locatable mineral, and this determination must be made without any consideration of any value that a common variety mineral deposit on the same claim may have. See Hallenbeck v. Kleppe, 590 F.2d 852 (10th Cir. 1979), aff'g United States v. Hallenbeck, 21 IBLA 296 (1975); United States v. Lease, 6 IBLA 11, 79 I.D. 379 (1972); United States v. O'Callaghan, 8 IBLA 324 (1972); United States v. Chas. Pfizer & Co., Inc., 76 I.D. 331 (1969).

[4] We note that in its answering brief before Judge Clarke, the Government alleged that the record also supported a finding that the claims were not held in good faith for mining purposes as alleged in paragraph "c" of the contest complaint. Judge Clarke did not rule on this question. We have carefully reviewed the record, and while we agree that the record clearly supports a finding of no discovery, we do not believe there is sufficient evidence therein to support a finding of a lack of good faith on the part of these claimants. As we have noted in the past, in order to support a finding of bad faith the evidence must be substantial and clear. See United States v. Dillman, 36 IBLA 358 (1978). The testimony, particularly that of Peter B. Valdez, who worked the claims, clearly shows efforts toward developing a paying mine. While we hold the evidence clearly insufficient to establish a discovery, that mere fact does not establish mala fides.

We are aware that these new claims are merely relocations of the claims which the Board held were invalid in United States v. Bienick, 14 IBLA 290 (1974). These former claims, however, were primarily based on deposits of gravel and magnetite, whereas the present ones were mainly

based on gold deposits allegedly located in the stream bed. While we do not find present support for a finding of bad faith, we wish to caution appellants that future locations covering the same ground, absent a showing of values substantially superior to those heretofore presented, might well support a finding that the claims were not located or held in good faith for mining purposes.

Appellants have submitted various proposed findings of fact, which have been considered by this Board. Except to the extent that they have been expressly or impliedly affirmed in this decision, they are rejected on the ground that they are, in whole or in part, contrary to the facts and law or that they are immaterial. National Labor Relations Board v. Sharples Chemicals Inc., 209 F.2d 645, 652 (6th Cir. 1954).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

James L. Burski
Administrative Judge

We concur:

Bernard V. Parrette
Chief Administrative Judge

Edward W. Stuebing
Administrative Judge

June 16, 1978

United States of America,	:	Contest No. CA-3127
	:	
Contestant	:	Involving the Lost Horizon
	:	
Mine Placer Mining Claim; Lost	v.	: Horizon No.
1 Placer Mining	:	Claim; and Lost Horizon
No. 2 Virginia Prowell and	:	Placer Mining Claim Placer
	:	
Mining Claims, situated in Secs. and Milinda Prowell	:	3 and 4, T.
16 N., R. 1 E., H.M.,	:	Del Norte
County, California		
Contestees	:	

DECISION

Appearances: Charles F. Lawrence, Esq., Office of the General Counsel, U.S. Department of Agriculture, 2 Embarcadero Center, San Francisco, California, for Contestant; William B. Murray, Esq., Standard Plaza Building, Portland, Oregon, for Contestees.

Before: Administrative Law Judge Clarke

This proceeding was initiated at the request of the United States Forest Service by Complaint filed by the Bureau of Land Management on January 27, 1976. The complaint alleges in paragraph 5 as follows:

> "a. There are not presently disclosed within the boundaries of the mining claims, minerals of a variety subject to the mining laws sufficient in quantity, quality, and value to constitute a discovery.
>
> b. The land embraced within the claims is non-mineral in character.

c. The land embraced within the claims is not held in good faith for mining purposes.

A timely answer was filed on January 18, 1977. A Notice of Hearing was issued setting the hearing for April 21, 1977, in Crescent City, California, where the hearing was held as scheduled.

SUMMARY OF EVIDENCE

The 3 claims which are the subject of this contest appear to embrace the same land which was covered by mining claims which were the subject of contest before Judge Steiner, on November 3, 1971. One of the claims was declared null and void by Judge Steiner's decision on July 25, 1972. The other 2 claims were null and void by the decision of the Interior Board of Land Appeals, rendered January 31, 1974 (IBLA 73-91, 14 IBLA 290) (see TR 7-9). The contestant called MELINDA NORMA PROWELL as an adverse witness. Mrs. Prowell, one of the locators of these mining claims, stated:

> A: "In 1974, we relocated after they were considered void, we came and relocated the claims to protect my parents' interest in it because we were advised to by Mr. Millham, their lawyer.
>
> Q: "I take it you are Mrs. Bienick's daughter?"
>
> A: "Yes, I am."
>
> Q: "And does she have other daughters?"
>
> A: "4 others." (TR 20-21)
>
> A: ". . . . we wanted to hold the claims and our lawyer advised us to just file on top of what was already established. We -- nobody really knew what to do, but we wanted to protect the claims for Mom and Dad." (TR22)

Q: "Can we assume that Placer gold is the only thing of significance you have discovered so far?"

A: "I guess yes on this contention you'd say that, yes."

Q: "All right. And would that be true as to all 3 claims?"

A: "Yes."

Q: "All right. So today we're going to talk about gold. What was the purpose of the Quitclaim Deed which has been introduced as Exhibit 7?"

A: ". . . . to put it back in my mother's name. You know, we were handling it for my parents until they could get back -- my Dad could regain his strength enough so they could get back and handle their own affairs. We just felt that it's still an old mining claim. It was discovered a very long time ago by my Dad and a very -- and his mining partner. And it was 19 -- discovered in 1953. The assessment work has been kept up on it every single year. And it's the place where we were raised and it's -- it was originally discovered by my parents in 1953 so we felt that, you know, we better quitclaim it back over to them so we could -- so we could still -- anything to be tried could be still under that way.

Q: "Have you felt that essentially they've been the owners of these 3 claims all along?"

A: "Absolutely; absolutely." (TR 31)

She stated that she and her husband Virgil Prowell worked the claims in 1974, 1975, and 1976, and that they had performed perhaps 9 months work altogether. During that time they recovered a little over 4 ounces of gold, which they have sold. It amounted to approximately

$1,500. She stated that they worked everyday, like a job. (TR 24-26) They had 2 partners Ray Mandt and Richard Lattimer who recovered 2-3 ounces working 2 months. She got one-third of the nugget gold which they recovered for jewelry. These 2 people used a 6" dredge.

Mr. Emmett Ball, a qualified mining engineer employed by the United States Forest Service, testified as to his examination of the claims. He indicated that the claims in this case covered the same ground as the 3 claims in the previous hearing (TR 52). That he had been on the previous claims on the ground 5 or 6 different times and several times on the new claims. On his second visit he just observed. (TR 53) Exhibit 9 is an assay of a sample which he took on one of the claims at the point indicated as a discovery point. This assay showed less than 3 cents in gold per yard of gravel. He described the creek where the gold has been recovered as being narrow with bedrock showing in most places on both sides. The creek has steep banks up to a flat on the western side which has been mined off. Most of the the amount of gravel available on the claims for his purpose as being flat is on the Lost Horizon claim where the cabins and fruit trees are located. (TR 57)

Mr. Ball described the type of mining done in the creek by the claim owners or on their behalf as "sniping" or recreation mining. (TR 63)

It was his opinion that the yardage of gravel in the stream bed was quite low. In order to have a commercial operation you would have to have extremely high values, in his opinion, because there was so little material available for processing. (TR 64)

He indicated that bedrock is exposed essentially the entire length of the stream bed. From his examination of the claims, it was Mr. Ball's determination that a prudent man would not be justified in expending time, money, and effort, on any one of the claims with the reasonable hope of developing a paying mine. (TR 67)

Mr. Walter B. Sweet, a civil engineer, testified concerning the quality and quantity of gravel in the area for use as roadbase. He estimated the amount of gravel available on the claims for his purpose as being 750,000 yards. (TR 118)

He testified that the present demand for aggregate was being met by other producers in the general area.

Peter B. Valdez testified for the contestees that he had mined gold from the claims at issue in this proceeding but that they had not sold any of it. Some of the gold he had turned into jewelry, but no cash was actually gained from it. The gold was appraised by a jewelry store owner in

Grants Pass for jewelry purposes. The amount which he mined was 4 ounces, 7 grains, and came from Myrtle Creek on all 3 claims. This gold was recovered during the dredging season from May 15th to September. He estimated the amount of material moved and believed that it was somewhere between 100 and 130 yards. He found one nugget weighing 7 pennyweight, one 4 pennyweight and several at 2 and 3 pennyweights. To mine this material he used 2 different suction dredges; one of 5-inch and one of 6-inch diameter. It was his estimate that he moved approximately 25 to 30 yards of material to recover one ounce of gold. He stated that at the time he was unemployed so his income from the claim was pure profit and that his expenses were negligible and his equipment was already paid for. It was his opinion that if he converted the gold to cash at market values with regard to that which is jewelry grade he would have been able to recover over $1,000 for a 3 months period. (TR 136)

It was his opinion that there were standard offers for 2 times the world market for jewelry grade gold. He stated that he had worked the most accessible ground with the shallowest overburden. These areas had been mined by those who mined before him. He also picked up some iron crystals. He says he had an offer of $300 for an indefinite amount of the iron crystals. Mr. Valdez is married to Mrs. Bienick's granddaughter. When asked if he was of the opinion that "a man of ordinary prudence would spend time and money operating a -- one of these dredges . . . . on these particular contested claims," he stated that, "if he were looking for great profit it would be speculation; if he were looking to just make ends meet, I don't see -- any problems with it . . . ." (TR 158-159)

Virgil Prowell testified saying that his main interest in filing the claims was gold. That he mined in 1974 and recovered 4 ounces of gold using a 3" dredge. He didn't take any measurements as to gravel moved to recover this amount of gold. He did find one nugget that weighed 17-1/2 pennyweight and sold it for $400. (TR 165) Generally Virgil Prowell's works as a logger driving a "cat" at $6.00 an hour. When he was mining, his wife and a friend helped him with the dredge.

Mrs. Harry Bienick testified that her husband has been ill but that she has worked the claims. She stated that she had a standing order for magnetite crystals in the amount of $300. Her testimony indicated that the Prowells relocated the claims to protect the Bienick's cabins and that she has done no mining since 1974.

SUMMARY OF APPLICABLE LAW

In this proceeding, the Contestant is required to produce sufficient evidence to establish a prima facie case in support of its contention that a discovery does not exist on the contested claim. Thereafter, the Claimant must show by a preponderance of the evidence that the claim is valid. Foster v. Seaton, 271 F. 2d 836 (D.C., C.A., 1959).

It has been held in a long list of cases beginning in 1894 that a discovery exists where:

> "* * * minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a profitable mine . . . ." Castle v. Womble, 19 L.D. 455, 457 (1894).

In the Supreme Court case of Chrisman v. Miller, 197 U.S. 313 (1905), the Court approved the earlier definition by the Department that a mineral found on a claim such as gold or silver must exist in quantities sufficient to justify the expenditure of money for the development of the claim and extraction of the mineral.

The Supreme Court has further held that it is the intent of the mining laws to reward the discovery of minerals which are valuable in an economic sense and that the minerals which would not be extracted by a prudent man because there is no demand for them for a price higher than the extraction and transportation costs are not economically valuable. United States v. Coleman, 390 U.S. 599 (1968).

A prima facie case has been made when a Government mineral examiner testifies that he has examined the claim and found the evidence of mineralization insufficient to support a finding of a discovery. United States v. Shield, 17 IBLA 91 (1974); United States v. Ramsher Mining and Engineering Co., Inc., 13 IBLA 268 (1973); United States v. Woolsey, 13 IBLA 120 (1973); United States v. Gould, A-30990 (May 7, 1969).

DISCUSSION AND CONCLUSION

The ground covered by the 3 mining claims here in question was the subject of a decision by the Interior Board of Land Appeals, issued January 31, 1974. In that decision, the Board as well as the Administrative Law Judge, considered the questions of whether or not the gravel was of locatable material together with the minor amounts of gold which had been discovered, and magnetite crystals. The Board said in that case "material which is suitable only for fill purposes, road base, or comparable uses is not locatable under the mining laws and even if the material is suitable for the purposes, its sale for the above uses cannot be considered in determining its marketability." Concluding, the Board stated, "as to the small amounts of gold the evidence does not show that a prudent person would be justified in expending labor and means in expectation of developing a valuable mine. As to the sales of crystalline deposits such as the specimen, such specimens are valuable as natural curiosities but are not subject to location under the mining law. South Dakota Mining Co., v. McDonald, 30 L.D. 357 (1900)." And speaking of sand and gravel, Judge Stuebing in his concurring opinion states, "Nevertheless, even where the material was previously regarded as a mineral subject to location because it met engineering requirements for compaction, hardness, soundness, stability, favorable gradation, non-reactivity and non-hydrophilic qualities in road building and similar work, after July 23, 1955, these materials were treated as common varieties, and therefore not locatable, because materials which meet these standards are common, abundant and of widespread occurrence." United States v. Cardwell, A-29819 (March 11, 1964); United States v. Basich, Hensler, A-29973 (May 14, 1964); United States v. Basich, A-30017 (September 23, 1964).

There was nothing in the testimony received at this hearing which would indicate the sand and gravel was anything more than a common variety. The testimony further showed that the market demand for sand and gravel was being met in the area. There was no showing that the sand and gravel on these claims could have competed in the market. The claimants regarded gold as the basis for their discovery. There is no question but what some gold can be recovered from these mining claims. One of the miners testified that the claims had been mined several times previously. It is obvious that there is a certain amount of replenishment from upstream areas, otherwise gold could not be continually recovered. It is quite clear that some of the gold recovered is valuable for jewelry and without a doubt brings a price that is higher than the world market. Nonetheless, even at the rate of twice the world market, the recovery of $1,000 worth of gold for 3 months labor does not appear to be the kind of operation which one would classify as commercial, nor does it hold the possibility of being turned into something commercial since the volume

of gravel is so minimal. It is the kind of mining that furnishes recreation possibilities, not only here but in many places in Northern California. Each summer this activity brings out the recreationists in droves to play miner. Without doubt, here, as well as in other places in Northern California and Southern Oregon there is some recovery of gold to repay the efforts of those who enjoy this activity. It is not probable that many would give up their normal form of money producing work for the uncertainties of gold mining with a 3 or 4 inch suction dredge in a creek that had been mined 6 times previously.

The contestees have failed to preponderate against the prima facie case of the contestant that the reasonable prudent man would not expend his time and effort with reasonable expectation of developing a paying mine. Thus, in finding these claims null and void the proceedings have gone a complete circle from the time of the IBLA decision in 1974. One cannot help wondering how often the Department will be called upon to rule on virtually the same set of facts, covering the same block of land and involving virtually the same claim owners.

Based on the foregoing findings and conclusions, I hereby declare Lost Horizon Mine placer mining claim, Lost Horizon #1 placer mining claim, and Lost Horizon #2 placer mining claim to be null and void.

E. Kendall Clarke
Administrative Law Judge

Appeal Information

An appeal from this decision may be taken to the Board of Land Appeals, Office of the Secretary, in accordance with the regulations in 43 CFR Part 4 (revised as of October, 1976). Special rules applicable to public land hearings and appeals are contained in Subpart E. If an appeal is taken, the notice of appeal must be filed in this office (not with the Board) in order to facilitate transmittal of the case file to the Board. If the procedures set forth in the regulations are not followed, an appeal is subject to dismissal. The adverse party to be served with a copy of the notice of appeal and other documents is the attorney for The Bureau of Land Management whose name and address appear on the following page.

Enclosure: Additional information concerning appeals
Distribution:

William B. Murray, Attorney and Counselor at Law, 1610 Standard Plaza, Portland, Oregon 97204 (cert.)
Charles F. Lawrence, Attorney, Office of the General Counsel, U.S. Dept. of Agriculture, Two Embarcadero Center, Suite 860, San Francisco, California 94111 (Cert.)
Virgil and Melinda Prowell, P.O. Box 176, Gasquet, California 95543
Standard Distribution